Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1926

No. 98

LASH'S PRODUCTS COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 31, 1926

CERTIORARI GRANTED MAY 10, 1926

(33,310)

(33,310)

SUPREME COURT OF THE UNITED STATES

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LASH'S PRODUCTS COMPANY, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1928

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 858

LASH'S PRODUCTS COMPANY (a Corporation), Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lash's Products Company (a Corporation), by its counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered November 7, 1927, which denied petitioner's claim for refund of sales tax in the amount of $22,500.33. Motion for a new trial was overruled January 23, 1928.

Statement of the Case

Prior to 1919, petitioner was engaged in the manufacture of cordials, syrups, and laxative medicinal preparations.

In June 1919 it began the manufacture and sale of soft drink products, which were sold direct by its salesmen, who called upon its customers and told them that the price quoted for these soft drinks included the sales tax, which petitioner was required by statute to report and pay.

[fol. 2] Petitioner also notified its customers by letter, under date of June 28, 1919, that it was engaging in the sale of soft drinks and informing them of the prices therefor (all tax paid) and the conditions under which such soft drinks would be sold.

During the period involved in this case, petitioner received $2,475,031.44 from its soft drink sales at the prices quoted therefor, which included the tax, and paid a sales tax thereon of $247,503.16. These soft drinks were invoiced or billed to the customer without separate itemiza-

tion or indication of the price of the goods and the sales tax thereon.

After its refunding claims for $22,580.33 had been rejected by the Commissioner of Internal Revenue, petitioner brought suit in the Court of Claims for said amount, on the ground that petitioner paid the 10 per centum sales tax, not on the sum it actually received for its goods, but on the sum it actually received for its goods plus the 10 per centum sales tax included in petitioner's gross price, and the difference between these amounts is the sum sued for.

Questions Presented

1. Within the meaning of the provisions of Section 628 and 629, and in view of the provisions of Section 1312, of the 1918 revenue act, was petitioner's selling price upon which the sales tax was to have been computed the gross amount it received from its customers, which included the tax, or was its true selling price the part thereof petitioner was to retain as its own after paying the tax so included?

2. Where petitioner's customers purchased its products with the understanding that the amount paid for them included the sales tax thereon, is it legally necessary that the [fol. 3] invoice for the goods so purchased should specifically show or indicate both the amount petitioner was to receive for the goods and the tax thereon, in order that petitioner might pay the tax on said amount received for the goods and not upon the sum of that amount plus said tax.

3. Is the sales tax in this case based upon the price actually received for the product or upon the amount collected, which included both the price of the product and the sales tax thereon?

4. Where the petitioner sold soft drinks for an amount which included both the price for the goods and the sales tax thereon, and the purchaser so understood, can the Commissioner of Internal Revenue, by regulation, deprive petitioner of its right to show the true price for which its goods were sold and increase the statutory rate of sales tax from 10 to 11 per centum because petitioner's invoices or bills did not separately itemize or indicate both the price of the goods so sold and the amount of the sales tax thereon?

Reasons for Granting This Petition

1. The questions involved are important, effecting the revenue of the Government and are, therefore, of public interest and general importance.

2. At the time the case at bar was presented to the Court below, the basic question here involved had been decided in favor of petitioner's contention by the District Court in Clicquot Club Company v. United States (13 Fed. R. (2nd) 655), which was not appealed, and adversely to petitioner's contention by the District Court in Elmer Candy Company, Incorporated, v. Fauntleroy (19 Fed. R. (2nd) 664). Since the decision of the lower court herein, this question has [fol. 4] been decided adversely to petitioner's contention by the District Court in White Rock Mineral Springs Company v. Edwards (23 Fed. R. (2d) 539), and later in favor of petitioner's contention by the Circuit Court of Appeals in Elmer Candy Company, Incorporated, v. Fauntleroy, decided February 2, 1928, not yet reported, which reversed the decision of the District Court referred to above in that case.

The net result of the interpretation of the law herein by the courts to date show a Circuit Court of Appeals differing with the Court of Claims, and one District Court disagreeing with another.

3. Many similar cases are pending in the courts, and it has been stipulated that forty nine of such cases now pending in the Court of Claims shall be decided in accordance with the final disposition of the case at bar.

4. It is in the public interest to have the questions here involved decided by the court of last resort.

5. The customer bought the goods with the understanding that the tax was included in the price he paid the company. If the company is required to pay a tax on the amount of tax so paid to it by the customer the legal tax rate of 10 per centum is thereby increased to 11 per centum on the price for which the goods were sold, for which there is no authority in the statutes.

6. Petitioner by its salesmen informed its customers that the price quoted for its soft drink products and for which

it sold such products to them included the sales tax, which the statute required it to pay.

[fol. 5] 7. The Commissioner of Internal Revenue was without legal authority to require petitioner to set up or indicate in its invoices or bills the price of its goods in one item and the amount of the sales tax thereon in another item, in order for petitioner to avoid being required to pay the sales tax on both the price for which it sold its products and also on the sales tax thereon so paid by the customer.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

Lash's Products Company, by A. R. Serven, Counsel.
Daniel R. Forbes, Richard D. Daniels, of Counsel.

[fol. 1] In Court of Claims of the United States

No. D-412

Lash's Products Company, a Corporation,

vs.

The United States

I. History of Proceedings

On June 30, 1924, the plaintiff filed its original petition.

On August 30, 1924, a general traverse was entered under Rule 34.

On May 21, 1927, by leave of court, the plaintiff filed its Amended Petition.

Said Amended Petition is as follows:

II. Amended Petition—Filed May 21, 1927

To the Honorable the Court of Claims:

The claimant in the above-entitled cause respectfully represents to the Honorable Court:

I

The claimant is a corporation duly organized and existing under the laws of the State of California, having its

principal place of business and office in the City of San Francisco, in said State, with established places of business and offices in the City of Chicago, State of Illinois, and in the City of New York, State of New York, and is now and has been continuously engaged since 1884 in the business of manufacturing and selling cordials, syrups and laxative medicinal preparations.

II

The claimant in June of the year 1919 for the first time entered into the manufacture of soft-drinks and therefore [fol. 2] became subject to the provisions of the Act of Congress entitled, "An Act to Produce Revenue and For Other purposes," approved February 24, 1919, and especially subject to the provisions of the last clause of Section 628 (a) therein contained and reading as follows:

Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one half of one per centum of alcohol, sold by the manufacturer, producer or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold.

III

The claimant, beginning in the month of June, 1919, offered the soft-drinks of its manufacture direct to its retail customers through its own salesmen at certain gross or list prices, which prices included the 10% sales tax thereon. Said salesmen personally called upon customers of claimant and advised them that the gross or list price so quoted was the claimant's selling price and in addition thereto an amount equal to ten per centum thereof, said additional amount being the 10% sales tax thereon as imposed by the Revenue Act of 1918 aforesaid. Claimant's customers were universally so informed that the said list [fol. 3] or gross price was inclusive of the said 10% sales

tax which the claimant as manufacturer was required to report and pay to the defendants, and the said customers so understood.

IV

The claimant, consistent with the provisions of the Revenue Act of 1918, through its three regular established offices aforesaid, reported each month to the collector of internal revenue for the appropriate district the total amount of sales of such taxable soft drinks sold during the preceding month, and listed in said monthly return the total gross amounts which the claimant had received from its customers, which included said tax of 10% of the selling price. Claimant avers that said monthly returns were prepared by clerks in its employ who had no previous experience with sales tax and that through mistake of fact reported the total receipts as sales subject to the said sales tax and computed and paid ten per centum thereon, whereas the tax should have been one-eleventh of the gross receipts, said gross receipts in fact consisting of the sum of the selling price plus ten per centum thereof. Claimant, solely by mistake of fact in relation to figures, reported and paid to the defendants as sales tax ten per centum of the whole gross price it had received from its customers, whereas in fact said gross price was the sum of (1) claimant's selling price and (2) ten per centum thereof, which was the sales tax so imposed as aforesaid, and the customers of the claimant had been so informed and so understood.

[fol. 4]

V

Claimant reported and paid to the defendants as aforesaid the following:

Gross amount (which included 10% tax), $2,475,061.44; tax paid, $247,506.25.

Claimant avers that it was in error in reporting and paying to the defendants ten per centum of the gross amounts so received from the customers which included in it ten per centum of the actual selling price and avers that the defendants were entitled, under the provisions of the Revenue Act of 1918, only to one-eleventh of said gross amount which is equivalent to ten per centum of said actual selling price. Claimant, for greater particularity, annexes hereto

and makes a part of this petition, and identified as Exhibit "A," a detailed statement of the tax reported and paid.

VI

Claimant, on March 20th, 22nd, and 26th, 1923, filed with the Commissioner of Internal Revenue of the United States, in accordance with the statutes in such case made and provided, claims for the refunding of a total of $22,500.33, which represented the difference between the total sales tax so erroneously paid by claimant to defendants, and the amount actually due and imposed by said Revenue Act of 1918. Claimant's refunding claims were on November 5th, 6th, and 13th, in the year 1923, by letters addressed to each of the said offices of the claimant, rejected by the Commis- [fol. 5] sioner of Internal Revenue of the United States in the total sum of $22,500.33, the said letters of rejection stating among other things as follows:

You have now submitted affidavits from the manager of the company and from several of your salesmen and customers in which it is stated that it was explained by the salesmen to the customers that the list price was the total of the seling price and the tax. The evidence shows, however, that you did not indicate the tax in such a way as not to be a part of and included in the price for which your product sold, and since the amount for which you are seeking refunds was paid upon the selling price for the beverages, the tax has been properly paid, even though you contemplated tax in the price for which your product sold.

VII

The collection and retention of that part of the sales tax amounting to $22,500.33 not refunded to claimant was unlawful for the following reasons:

(1) Claimant, dealing with its retail trade by means of salesmen who personally called upon their customers, took the most efficient means to inform said customers that the list or gross prices quoted were the sum of claimant's selling price and the tax due and payable to defendants, and did so inform said customers and said customers so understood. Said gross or quoted price was represented to be and in fact did amount to the claimant's selling price plus

the sales tax of ten per centum thereon. Claimant clearly indicated to its customers that it was required by the provisions of the Revenue Act of 1918 to pay to defendants the [fol. 6] sales tax which was included in said gross price, and the said customers so understood.

(2) Claimant, in paying ten per centum of the gross amount received from its customers, paid to the defendants an amount which was not equal to ten per centum of the selling price, but was in fact an amount equal to ten per centum of the sum of the selling price and the tax, or one hundred and ten per centum of the actual selling price as offered by the claimant and fully understood by the customers purchasing said products. Claimant avers that the defendants received from it a tax upon a tax to the extent and amount of the refund claimed by the claimant and wrongfully rejected and illegally and unequitably withheld by defendants as aforesaid.

VIII

Claimant avers that it is and has been the owner of the claim hereinbefore set forth continuously from its inception, and has never sold or assigned the same or any part thereof or interest therein; that claimant is justly entitled to the amounts herein claimed from the United States after allowing all just credits and set offs; that claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government or aided or abetted or given encouragement to its enemies, and claimant believes that the facts stated herein are true.

[fol. 7] IX

Claimant therefore prays judgment against the United States for the sum of $22,[illegible], and interest thereon.

Lash's Products Company, by Forbes and Daniels, Its Attorneys, by Daniel R. Forbes. A. R. Serven, Esq., of Counsel.

[fol. 8] EXHIBIT "A" TO AMENDED PETITION

Itemized Statement of Tax Reported and Paid and Refund Claimed

Lash's Products Company, San Francisco Office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	July	1,879.64	187.96	170.88	17.08
	Aug.	5,806.16	580.62	527.83	52.79
	Sept.	7,554.80	755.49	686.81	68.68
	Oct.	11,359.24	1,135.92	1,032.66	103.26
	Nov.	13,765.61	1,376.56	1,251.42	125.14
	Dec.	22,004.01	2,200.40	2,000.36	200.04
1920	Jan.	16,336.73	1,633.67	1,485.16	148.51
	Feb.	17,073.18	1,707.32	1,515.74	251.58
	Mar.	19,572.48	1,957.27	1,779.33	177.94
	Apr.	13,500.10	1,350.10	1,209.19	120.91
	May	10,186.21	1,018.62	926.02	92.60
	June	11,378.22	1,137.82	1,034.38	103.44
	July	7,725.92	772.59	702.36	70.23
	Aug.	9,656.25	965.63	877.84	87.79
	Sept.	12,947.56	1,294.76	1,177.05	117.71
	Oct.	15,290.56	1,529.04	1,390.85	139.09
	Nov.	14,504.35	1,450.44	1,318.76	132.68
	Dec.	7,913.42	791.34	719.40	71.94
1921	Jan.	5,790.05	579.01	526.37	52.64
	Feb.	5,534.46	553.45	503.13	50.32
	Mar.	4,270.92	427.09	388.26	38.83
	Apr.	3,346.14	334.61	304.19	30.42
	May	2,048.36	204.80	186.27	18.53
	June	2,786.72	278.63	253.29	25.34
	July	1,100.90	110.10	100.54	10.56
	Aug.	1,611.00	161.10	146.46	14.64
	Sept.	2,402.56	240.26	218.41	21.85
	Oct.	2,630.25	263.03	239.83	24.10
	Nov.	1,746.80	175.00	159.72	15.97
	Dec.	1,585.54	156.55	141.43	14.14
	Total	253,868.54	25,385.27	22,388.00	2,338.84

[fol. 9] Lash's Products Company, New York office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	June	7,458.70	745.87	678.03	67.80
	July	35,766.10	3,576.61	3,251.46	325.15
	Aug.	56,059.20	5,605.92	5,096.29	509.63
	Sept.	65,573.70	6,557.17	5,961.06	596.11
	Oct.	91,230.70	9,123.07	8,293.70	829.37
	Nov.	94,573.80	9,457.78	8,597.07	859.79
	Dec.	177,151.00	17,717.16	16,106.51	1,610.65

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1920	Jan.	127 474 00	12 747 40	11 588 55	1 158 85
	Feb.	100 700 50	10 070 05	9 150 86	920 19
	Mar.	190 000 00	19 000 00	17 271 86	1 728 14
	Apr.	79 596 40	7 955 64	6 966 36	989 28
	May	55 197 40	5 519 74	5 109 56	410 18
	June	28 663 70	2 866 37	2 665 88	200 49
	July	18 018 50	1 801 85	1 710 80	171 05
	Aug.	17 736 20	1 773 62	1 612 38	161 24
	Sept.	25 826 70	2 582 67	2 330 61	252 06
	Oct.	26 177 70	2 617 77	2 379 79	237 98
	Nov.	25 328 50	2 533 05	2 249 80	283 09
	Dec.	16 368 40	1 636 84	1 488 04	148 80
1921	Jan.	11 358 20	1 135 82	1 032 56	103 26
	Feb.	7 519 10	751 91	683 55	68 36
	Mar.	1 980 50	198 05	168 60	16 45
	Apr.	3 171 70	317 17	288 34	28 83
	May	5 407 70	540 77	515 25	25 52
	June	2 571 60	257 16	233 78	23 38
	July	1 801 20	180 12	163 75	16 37
	Aug.	2 725 80	272 58	247 33	25 25
	Sept.	2 598 10	259 81	236 02	23 79
	Oct.	2 760 70	276 07	250 97	25 10
	Nov.	3 288 30	328 85	298 01	30 84
	Dec.	2 630 00	263 00	240 91	24 09
	Total	1 261 000 70	126 100 07	114 688 52	11 411 15

[fol. 10] Lash's Products Company, Chicago office

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
1919	July	8 945 20	894 52	813 65	80 87
	Aug.	11 055 40	1 105 54	1 005 85	100 69
	Sept.	16 850 50	1 685 05	1 532 14	152 91
	Oct.	26 911 10	2 691 11	2 446 46	244 65
	Nov.	59 275 50	5 927 55	5 392 77	534 78
	Dec.	85 802 30	8 580 23	7 670 50	762 46
1920	Jan.	76 708 70	7 670 87	6 973 52	696 35
	Feb.	94 094 40	9 409 94	8 572 65	837 29
	Mar.	113 145 10	11 314 51	10 285 92	1 028 59
	Apr.	51 876 40	5 187 65	4 716 45	471 20
	May	70 819 10	7 081 91	6 438 51	643 40
	June	43 040 50	4 304 05	3 907 72	396 33
	July	27 523 40	2 752 34	2 501 91	250 43
	Aug.	27 643 70	2 764 37	2 513 06	251 31
	Sept.	32 804 80	3 280 48	2 980 80	299 68
	Oct.	50 292 00	5 029 20	5 090 27	509 93
	Nov.	41 727 40	4 172 74	3 793 40	379 34
	Dec.	13 362 30	1 336 23	1 230 21	106 02
1921	Jan.	17 967 00	1 796 70	1 629 35	167 35
	Feb.	14 461 90	1 446 18	1 314 38	131 80
	Mar.	8 262 30	826 23	754 77	71 46

Year	Month	Sales invoiced at a gross price which included the tax	Total tax paid 1-10	Total tax due 1-11	Refund claimed
	Apr	3,750.40	375.04	341.76	31.18
	May	4,044.50	404.45	367.68	36.77
	June	3,077.80	307.78	279.80	27.98
	July	2,127.30	212.73	193.39	19.34
	Aug	3,373.50	337.35	306.23	30.12
	Sept	6,957.00	695.70	695.18	60.52
	Oct	15,208.50	1,520.85	1,382.50	138.26
	Nov	12,795.30	1,279.53	1,163.21	116.32
	Dec	6,053.70	605.37	550.34	55.03
	Total	959,596.20	95,955.62	87,232.37	8,723.25

[fol. 11]

Summary

Total gross receipts	Total tax paid 1-10	Total tax due 1-11	Total refund claimed
2,475,031.44	247,502.36	224,911.02	22,591.24

[fol. 12] *Duly sworn to by Warren Spicker. Jurat omitted in printing.*

[fol. 13] III. General Traverse.—Filed May 24, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

J. H. S.

IV. Argument and Submission

On October 12, 1927, this case was argued and submitted on merits by Mr. A. R. Serven, for the plaintiff, and by Mr. J. H. Sheppard, for the defendant.

[fol. 14] V. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed November 7, 1927

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Special Findings of Fact

I

The plaintiff is a corporation duly organized and existing under the laws of the State of California, with its principal office in the city of San Francisco, California, and branch offices in Chicago, Illinois, and New York City, New York, and since the year 1884 it has been continuously engaged in the manufacture and sale, at wholesale, of cordials, syrups, and laxative medicinal preparations.

II

The plaintiff was organized and incorporated under the name of Lash's Bitters Company, under which name it carried on its business until during the year 1920, when its name was duly changed to Lash's Products Company, but without change in the status or identity of the company.

III

Beginning in June, 1919, the plaintiff manufactured and sold soft-drink products, the sales of which were made direct to customers in the retail trade on orders obtained by its salesmen.

Plaintiff's salesmen personally called upon the customers aforesaid and told them that the prices quoted to them on its nonalcoholic beverages included the sales tax, and that payment thereof would be made by the plaintiff.

The plaintiff also notified its customers by letters dated June 28, 1919, reading in part:

"We are pleased to quote you prices on all our goods as follows:

	Less than 5 cases	5 cases 10 cases	10 cases 100 cases
Lash's Bitters (officially classed as a medicine, not a beverage), per case	$10.00	$9.50	$9.00
Homer's Ginger Cordial, nonalcoholic (all taxes paid)	8.00	7.50	7.00
Hill's Horehound and Irish Moss, nonalcoholic (all taxes paid)	8.00	7.50	7.00
Clark's Cordial, nonalcoholic (all taxes paid)	8.00	7.50	7.00

[fol. 15] "Terms: All goods shipped with sight draft for the amount of invoice (less 2% discount allowed for cash) attached to bill of lading.

"We allow freight on shipments of ten (10) or more cases and orders may be assorted to suit your requirements.

"You will please note that we pay the tax on our nonintoxicating goods—which amounts to 10%—and as they sell at 10c or more per drink, it leaves a nice margin of profit for you."

IV

During the period involved in this suit the plaintiff manufactured and sold to its said customers the aforesaid soft-drink products, and from the said customers received in return $2,475,031.44. All the goods so sold were invoiced or billed to the customer at prices which were not itemized in the bill or invoice so as to show any tax, and payment in each instance was made by the customer to the plaintiff of the total amount invoiced less agreed discount for cash.

The amounts received on account of such sales were reported by plaintiff monthly to the proper officers of the Bureau of Internal Revenue, and in monthly current payments a total of $247,503.16 was paid by plaintiff to the United States as the 10 per cent beverage tax on said sales, under the revenue act of 1918, and as follows:

1919

June	$745 83
July	4,658 89
August	7,294 08
September	8,994 71
October	12,950 10
November	16,771 50
December	28,306 81

1920

January	22,040 94
February	21,538 21
March	32,281 28
April	13,873 39
May	11,620 26
June	8,807 24
July	5,416 58
August	5,503 62

September	7,143 91
October	10,075 91
November	7,866 13
December	3,781 41

1921

January	3,507 13
February	2,751 84
March	1,438 29
April	1,027 72
May	956 12
June	843 57
July	508 95
August	781 03
September	1,135 77
October	2,061 95
November	1,794 07
December	1,025 92
	247,503 16

The said sum of $247,503.16 is retained in the Treasury of the United States.

V

On or about March 20, 1923, the plaintiff filed claims with the Commissioner of Internal Revenue for the refund to it of $22,500.33 as being the amount erroneously computed and overpaid by it as beverage tax on the said sales of its soft-drink products. On November 5, 6, and 13, 1923, the said claims were finally disallowed by the Commissioner of Internal Revenue on the ground that plaintiff "did not indicate the tax in such a way as not to be a part of and included in the price" for which the product was sold.

[fol. 16] CONCLUSION OF LAW

From the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this

cause, the amount thereof to be entered by the clerk and collected by him.

OPINION

GRAHAM, Judge, delivered the opinion of the court:

The plaintiff was a manufacturer and seller of certain so-called soft drinks and beverages. Sales were made to the retail trade, who were informed by the salesmen that the price of plaintiff's product would not be increased on account of the beverage tax imposed by the revenue act of 1918, but that the price would remain the same as before the act was passed. Plaintiff's customers understood that it would pay the tax on beverages, and that they would not be billed therefor. During the period involved in the instant case the plaintiff received $2,475,031.44 from sales and paid to the collector of internal revenue 10 per cent thereof. This suit is brought to recover the sum of $22,-588.03, with interest, upon the ground that in paying 10 per cent on the amount received from sales under the aforesaid arrangement with its customers it had paid a tax on a tax, and that the price at which its product was sold was not the price actually received from its customers, but that sum less the tax paid; that the product having been sold for $8, the 10 per cent tax paid amounting to 80 cents, the price the plaintiff received for its product was $7.20, and that it was only liable to pay a tax of 10 per cent on this latter sum.

The statute provides that the manufacturer shall pay "ten per centum of the price for which [the product is] so sold." The question involved is: What shall be taken as the selling price, the sum actually received or another sum less the tax paid?

The plaintiff contends that if the tax is levied upon the sum received it is being taxed upon a tax; that it pays not only a tax upon the sum received for its product but also upon the tax paid on it. The defendant, on the other hand, contends that the "price" at which sold means what it says; that is, the sum actually paid by the buyer to plaintiff, the price which the plaintiff on its contract with the purchaser could collect from the purchaser. In the case of the J. Hungerford Smith Grape Juice Co., 63 C. Cls. 140, decided February 14, 1927, this court, in passing upon the question whether goods sold with a discount of 2% on the price if

paid within 10 days were to be taxed on the billing price or the price less 2% where the bill had been paid within 10 days, held that the manufacturer was only liable for tax on the price fixed by the agreement between the parties and paid to the manufacturer. The price was not determined until the buyer elected to pay in 10 days.

Plaintiff says in effect: "I billed the goods at $8, but I paid a tax of 80 cents, which is more than I should have [fol. 17] paid, because as $8 embraced the tax, the tax being 10 per cent, the amount that I actually received could only be ascertained by dividing $8 by 110, or $7.263+, and the tax on this sum would be $0.726+, and as 80 cents was paid I have overpaid my tax by the difference between the last-named sum and $0.726+."

The regulation of the Commissioner of Internal Revenue allowed the plaintiff to either add the tax to the selling price or, if it intended, as in this case, to pay the tax, to bill the goods with the price and the tax stated separately, and of this regulation the plaintiff must be visited with notice. It was a reasonable regulation and intended to save time, labor, and complications on the part of both the Government and plaintiff. The plaintiff did not observe the regulation. It billed the goods at $8, received that amount in payment therefor, and paid the tax upon this basis during six months of 1919, and for the years 1920 and 1921; in all, 30 months. It is evident that plaintiff thought that the tax was to be levied upon the price at which it sold the goods and which the customer paid therefor, and we think it reached the right conclusion.

The petition should be dismissed, and it is so ordered.

Moss, Judge; Booth, Judge, and Campbell Chief Justice, concur.

Hay, Judge, absent.

[fol. 18] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the Seventh day of November, A. D. 1927, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and

shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered and decreed that the United States have and recover of and from the plaintiff, as aforesaid, the sum of Two hundred fourteen dollars and eighty-two cents ($214.82), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

VII. Proceedings After Entry of Judgment

On January 6, 1928, the plaintiff filed a motion for a new trial.

On January 23, 1928, the court entered the following order on said motion:

Order

It is ordered by the court this 23d day of January, 1928, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,310. Court of Claims. Term No. 858. Lash's Products Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 24th, 1928. (33,310.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.